

CCASE:
DISCIPLINARY PROCEEDINGS
DDATE:
19860324
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DISCIPLINARY PROCEEDING

Docket No. D 86-1

DECISION

Appearances: Timothy W. McAfee, Esq., Norton, Virginia;
James B. Leonard, Esq., Arlington, Virginia
for the Secretary of Labor.

Before: Judge Merlin

This disciplinary proceeding is before me pursuant to order of the Commission dated January 8, 1986. A hearing was held on March 7, 1986.

The matter was initially referred to the Commission pursuant to Commission Procedural Rule 80, 29 C.F.R. 2700.80(FOOTNOTE 1) for

~411

disciplinary consideration by Administrative Law Judge George A. Koutras due to the failure of attorney Timothy W. McAfee to appear at a scheduled hearing on October 3, 1985, in a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977.

On July 10, 1985 Judge Koutras issued a Notice of Hearing in Secretary of Labor v. White Oak Coal Company, (Docket No. VA 85-21) which was a civil penalty proceeding under the Federal Mine Safety and Health Act of 1977. The notice concluded with the following instruction:

Any proposed settlements filed later than the ten-day period noted above will be rejected and the parties will be expected to appear at the scheduled trial of the case.

Mr. McAfee was not engaged as counsel for the operator until after July 10. But he was in the case on August 12 when he sent Judge Koutras the operator's response to the Secretary's Request for Admissions.

On August 30 Mr. McAfee and Mr. Mark R. Malecki, the Solicitor representing the Secretary of Labor, instituted a conference call with Judge Koutras. Pursuant to request of counsel Judge Koutras continued the hearing for several weeks and changed the hearing site. Mr. McAfee testified at the disciplinary hearing that prior to the conference call he was told by Mr. Malecki about the Judge's 10-day requirement (Tr. 9-10). Also at the disciplinary hearing, Mr. Malecki described the discussion of the 10-day requirement during the conference call itself (Tr. 32). On September 3 and September 24, Judge Koutras issued amended hearing orders scheduling the hearing for October 3 in Duffield, Virginia. Mr. McAfee received copies of these orders. He also received from the Judge a letter dated September 10, enclosing a letter the Judge had received from the operator. On October 2 the day before the scheduled hearing, Mr. McAfee and Mr. Malecki met in the former's office to discuss the case. On that occasion Mr. Malecki told Mr. McAfee he thought it was too late for a settlement in view of the Judge's 10-day requirement (Tr. 23, 30). Judge Koutras was mentioned by name (Tr. 30).

On the day of the hearing, October 3, at 7:30 a.m., the operator telephoned Mr. McAfee advising that he would pay the penalty of \$500 proposed by the Mine Safety and Health Administration (MSHA), and would not come to the hearing. Mr. McAfee then telephoned Mr. Malecki and told him that the operator was willing to pay MSHA's proposed penalty and that in light of this he saw no need to appear at the hearing (Tr. 6, 33). Mr. Malecki said he did not know what Judge Koutras would do, but

~412

that in light of the 10-day requirement he doubted the Judge would approve the settlement of \$500 and that he might have to put on his case (Tr. 33-34). As Mr. Malecki predicted, Judge Koutras proceeded with the hearing.

On the next day, Judge Koutras issued an order directing Mr. McAfee to show cause within 10 days why he should not be referred to the Commission for disciplinary action pursuant to 29 C.F.R. 2700.80 for his failure to appear at the hearing and for his failure to advise the presiding Judge that he would not appear. In his response filed October 17, Mr. McAfee stated that at the time the operator telephoned him on October 3 he did not have the file which reflected who the administrative law judge was and only knew where the Solicitor was staying. In the cover letter to his response Mr. McAfee asked Judge Koutras what disciplinary rule he had violated so he could further respond to the show cause order. On the same day Judge Koutras replied, citing 29 C.F.R. 2700.80(c) and giving Mr. McAfee a copy of the Commission's decision in Disciplinary Proceedings, 7 FMSHRC 623 (1985). The Judge gave Mr. McAfee an additional 10 days to respond, stating as follows:

The purpose of the show-cause order is to afford you an opportunity to explain your failure to appear at the scheduled hearing in this matter, or to advise me that you would not appear. Upon receipt of your reply, I will then determine whether or not to refer the matter to the Commission for possible disciplinary action pursuant to its rules.

Mr. McAfee did not respond further and, as already noted, Judge Koutras referred the matter to the Commission in his decision dated December 4, 1985.

In his petition to the Commission, Mr. McAfee again stated that on the morning of October 3 he did not know the name of the Judge and asserted that any implication to the contrary was unfounded.

It is difficult to accept Mr. McAfee's assertion that on October 3 he did not know Judge Koutras' name. Between August 30 and October 3 he participated in a telephone conference call with the Judge and received two orders and a letter from him. And on the day before the hearing Judge Koutras was referred to by name in the meeting Mr. McAfee had with Mr. Malecki. But even accepting Mr. McAfee's proffered excuse and viewing this aspect of the matter in the light most favorable to him, he could have obtained the Judge's name from Mr. Malecki when he spoke to Mr. Malecki on the morning of October 3. It is clear from Mr. McAfee's testimony at the disciplinary hearing that he did not

~413

obtain Judge Koutras' name or call him because the operator had agreed to pay MSHA's proposed penalty of \$500 (Tr. 16-17). According to Mr. McAfee it did not occur to him that the Judge would have any objection to an uncontested settlement (Tr. 17). This explanation cannot be accepted as a valid excuse for not appearing at the hearing. Mr. McAfee knew about the Judge's 10-day requirement. At the meeting on the day before the hearing, Mr. Malecki told Mr. McAfee he thought it was already too late for a settlement in light of the 10-day requirement (Tr. 30). And when Mr. McAfee spoke with Mr. Malecki on the morning of October 3, Mr. Malecki expressed the view that Judge Koutras would not approve the settlement and that he would have to put on his case (Tr. 33). At this point, both counsel were speaking about a settlement of \$500, MSHA's proposed penalty. Accordingly, on the morning of October 3 Mr. McAfee knew that despite the operator's willingness to pay \$500, his appearance was required and a good chance existed the hearing would go forward. Nevertheless, Mr. McAfee deliberately chose to disregard the Judge's orders and did so without bothering to personally notify him.

At the disciplinary hearing, Mr. McAfee stated he was unaware that a Commission Judge does not have to accept a proposed settlement even if it is for MSHA's proposed amount (Tr. 13). This asserted lack of knowledge is rejected in view of the advice Mr. McAfee received from Mr. Malecki that the hearing would probably go on despite operator acceptance of the \$500 penalty. In any event, such ignorance, even if true, cannot justify the failure to appear. As an attorney undertaking to act in cases under the Mine Safety Act, Mr. McAfee can be expected to be conversant with one of the most elementary principles governing these proceedings, i.e., the Judge's de novo authority in penalty cases. *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147 (7 Cir.1984). In this case after the hearing at which only the Solicitor appeared, the Judge issued a decision exercising his de novo authority and assessing a penalty of \$600. No appeal was taken. Of course, one does not know what would have happened if Mr. McAfee had appeared and cross-examined MSHA's witnesses. But he certainly did his client no service by his absence, leaving the Judge to decide the matter on a one-sided record.

Moreover, after being advised at the disciplinary hearing of the Judge's de novo authority in penalty cases, Mr. McAfee expressed no regret for his ignorance of applicable law or for his failure to appear, but rather stated that it was "disturbing" to him that a Judge would act the way Judge Koutras did. Mr. McAfee consistently has denied any responsibility and has instead criticized the Judge. In his petition to the Commission, Mr. McAfee asserted that Judge Koutras was incorrect in stating that he failed to respond. At the disciplinary hearing it was explained to Mr. McAfee that Judge Koutras was not

~414

referring to the show cause order dated October 4 but to his subsequent letter of October 17. Mr. McAfee then stated:

"I had already answered the man. And, he wanted me to answer him more and I didn't have any more to tell him" (Tr. 19).

Mr. McAfee's criticism of the tone of Judge Koutras' orders and letter is unfounded (Tr. 19). If the orders and letter indicate anything, it is that the Judge was giving Mr. McAfee every chance to explain his failure to appear. Insofar as "tone" is concerned, Mr. McAfee's written responses and oral testimony demonstrate irritation and impatience.

As an attorney appearing before a Commission Judge, Mr. McAfee was bound not to disregard any of his orders or rulings. Disciplinary Rule 7A106 of the Code of Professional Responsibility. But far from showing any sense of obligation to comply with the Judge's orders Mr. McAfee's lack of respect is evident from his statement at the disciplinary hearing:

"Well, I'll be happy to submit this to the Virginia State Bar and allow them to discipline me as they see fit. But I don't feel like I've violated any disciplinary rule or any ethetical [sic] consideration" (Tr. 20).

In addition to his refusal to acknowledge his professional obligations, Mr. McAfee also fails to understand that this Commission like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it. *Polydoroff v. I.C.C.*, 773 F.2d 372 (D.C.Cir.1985). It would be impossible for the Judges of this Commission to function if, as in this case, their orders were ignored with impunity and they themselves were held in such low regard by attorneys who practice before them.

In addition, Commission Judges travel at public expense to hearing sites convenient to the parties 29 C.F.R. 2700.51. That is what the Judge did in this case and Mr. McAfee knew it. But this factor obviously meant nothing, and as the record of the disciplinary hearing discloses, still means nothing to Mr. McAfee (Tr. 17-18).

The mere fact of counsel's absence from the hearing would not warrant disciplinary action if the absence resulted from good cause or excusable neglect. *Thyssen Inc. v. S/S Chuen On*, 693 F.2d 1171 (5 Cir.1982). In light of the circumstances set forth herein, I find that there was no good cause or excusable neglect. Mr. McAfee intentionally failed to appear although he knew his presence was required, had not been excused and that the case might well proceed in his absence.

~415

I am aware that this is the first Commission case in which Mr. McAfee has appeared and that this circumstance could be considered in mitigation. Disciplinary Proceedings, 7 FMSHRC 623 (1985). However, I conclude this is not an appropriate case for mitigation of disciplinary action. Mr. McAfee's inexperience was taken into account at the disciplinary hearing where applicable law was explained to him at length. But even then, he did not apologize or express regret either for his lack of knowledge or for his failure to appear. Throughout, his attitude toward this Commission and the Judge has been one of contempt and defiance.

In light of the foregoing, attorney Timothy W. McAfee is hereby REPRIMANDED and is hereby SUSPENDED from practicing before this Commission for a period of 60 days for unprofessional conduct in deliberately failing to appear at a hearing duly scheduled pursuant to orders of an Administrative Law Judge of the Commission.

Paul Merlin
Chief Administrative Law Judge

FOOTNOTE START HERE-

1 Rule 80 provides in pertinent part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, . . . or that he has violated any provisions of the laws and regulations governing practice before the Commission

(c) Procedure [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision

29 C.F.R. 2700.80.